92-875

No. _____

Supreme Court, U.S.
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In The
Supreme Court Of The United States

OCTOBER TERM, 1992

HEIRS OF MRS. M.H. CRAWFORD: Diane E. Honeycutt, Fern E. Honeycutt, Ellen Goldsworthy, Ralph Vernon Honeycutt, Calvin Guy Honeycutt, Eileen A. Honeycutt, Marjorie J. McGuire, Olin I. McGuire, Alfred W. McGuire, Shirley J. MacDonald, Margaret McCollum, Lena Nicholson, Helen Harder, Raymond Eisele, Frank Eisele, Darrell Eisele, Marie Holdren

PETITIONERS,

v.

HEIRS OF GEORGE NORBECK: Jane S. Norbeck, Trustee of the JANE NORBECK Trust dated November 20, 1963

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

Barnaby W. Zall
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Counsel for Petitioners

November 20, 1992

No. _____

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Supreme Court Of The United States

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HEIRS OF MRS. M.H. CRAWFORD: Diane E. Honeycutt, Fern E. Honeycutt, Ellen Goldsworthy, Ralph Vernon Honeycutt, Calvin Guy Honeycutt, Eileen A. Honeycutt, Marjorie J. McGuire, Olin I. McGuire, Alfred W. McGuire, Shirley J. MacDonald, Margaret McCollum, Lena Nicholson, Helen Harder, Raymond Eisele, Frank Eisele, Darrell Eisele, Marie Holdren

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(202) 659-8201
Counsel for Petitioners

November 20, 1992

QUESTION PRESENTED:

Whether the heirs of a private assignor of mineral rights may utilize the administrative rejection of registration of the assignment by a federal agency to void a 57-year-old assignment otherwise valid under state law and effective between the private parties?

LIST OF PARTIES:

Pursuant to Rule 29.1, Rules of the Supreme Court, counsel for Petitioners certifies that the complete list of all parties to the proceedings below and all parties and persons believed to be interested in the outcome of this Petition includes:

Diane E. Honeycutt

Fern E. Honeycutt

Ellen Goldsworthy

Ralph Vernon Honeycutt

Calvin Guy Honeycutt

Eileen A. Honeycutt

Marjorie J. McGuire

Olin I. McGuire

Alfred W. McGuire

Shirley J. MacDonald

Margaret McCollum

Lena Nicholson

Helen Harder

Raymond Eisele

Frank Eisele

Darrell Eisele

Marie Holdren

International Searchers, Inc.

Herbert O. Norbeck

Kermit G. Norbeck

Sterling M. Norbeck

Helen N. Bernard

Julius A. Bernard

Colette M. Norbeck

Virginia Norbeck

Jane S. Norbeck, Trustee of the Jane Norbeck Trust dated November 20, 1963

BARNABY W. ZALL

Counsel for Petitioners

TABLE OF CONTENTS

Table of Authorities i

Opinions Below 2

Statement of Jurisdiction 2

Statutes and Regulations Involved 2

Statement of the Case 3

Reasons for Granting the Writ 7

I. The Correct Federal Policy is Non-Entanglement 9

II. The Assignment is Valid Under Montana Law 11

III. The Assignment is Valid Under Federal Law 13

IV. The Montana Supreme Court Misinterpreted and Misapplied the Effect of the Federal Agency's Action 15

V. The Montana Supreme Court's Interpretation Should Be Reversed 16

Conclusion 16

Appendix . . . . .

Opinion of the Montana Supreme Court . . . . . App. 1

Opinion of the 16th Judicial District Court App.7

Assignment . . . . . App. 20

Federal Statutes . . . . . App. 22

Federal Regulations . . . . . App. 25

TABLE OF AUTHORITIES

CASES:

Aronow v. Bishop, 86 P.2d 644 (Mont. 1938) 11,12
Gibbons v. Pan American Petroleum Corp, 262 F.2d 852 (10th Cir., 1958) 15
Herigstad v. Hardrock Oil Co., 52 P.2d 171 (Mont. 1935) 11
Hobbs v. McLean, 117 U.S. 567 (1886) 9
In Re: "Agent Orange" Product Liability Litigation, 506 F. Supp. 737 (E.D.N.Y. 1979), *rev'd*, 635 F.2d 987 (2d Cir. 1989), *cert. denied, Chapman v. Dow Chemical Co.*, 454 U.S. 1128 (1981) 13
Issacs v. De Hon, 11 F.2d 943 (9th Cir. 1926) 11
Martin v. National Surety Co., 300 U.S. 588 (1937) 8, 9
McKenzie v. Irving Trust Co., 323 U.S. 365 (1945) 9
Miree v. DeKalb County, Georgia, 433 U.S. 25 (1977) 13
Oasis Oil Co. v. Bell Oil & Gas Co., 106 F. Supp. 954 (W.D. Okla. 1952) 10, 15
United States v. Little Lake Misere Land Co. Inc., 412 U.S. 580 (1973) 14
Wallis v. Pan-American Petroleum Corp., 384 U.S. 63 (1966) ..... *Passim*

STATUTES AND REGULATIONS:

28 U.S.C. § 1257(a) (1990) 2
30 U.S.C. § 187a (1990) 3, 7, 15
Mineral Leasing Act of February 25, 1920 (41 Stat. 437) 2, 8, 10
43 C.F.R. § 3106.7-1 (1991) 3, 14
Department of Interior Oil and Gas Regulations Para. 12 1/2 (1920) 3

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HEIRS OF GEORGE NORBECK: Jane S. Norbeck, Trustee of the JANE NORBECK Trust dated November 20, 1963

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

Petitioners (hereafter "Crawford Heirs") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Montana, entered in the above-entitled proceeding on August 25, 1992.

OPINIONS BELOW:

The opinion of the Supreme Court of Montana, *Norbeck, Trustee v. Crawford, et. al.*, No. 92-113 (Mont. S.Ct. August 25, 1992), is unreported but is reprinted in the Appendix hereto at Pages 1-6.

The opinion of the District Court of the Sixteenth Judicial District, In and for the County of Fallon, Montana, *Norbeck, Trustee v. Crawford, et. al.*, No. DV 5436 (Mont. 16th D.C., Fallon County, January 21, 1992), is unreported, but is reprinted in the Appendix hereto at Pages 7-19.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Montana was entered on August 25, 1992, affirming the decision of the Sixteenth Judicial District Court of Montana, entered January 21, 1992. The petition for a writ of certiorari is being filed on or before November 23, 1992.

The jurisdiction of this Court to review the judgment of the Supreme Court of Montana is invoked under 28 U.S.C. § 1257(a) (1990).

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations are involved in this case:

STATUTES

The Mineral Leasing Act of February 25, 1920 (41 Stat. 437), effective at the time of the assignment herein, is reprinted in the Appendix hereto at Pages 23-24.

The current version of the statute (30 U.S.C. § 187a (1990)), effective at the time of the quiet title action herein, is reprinted in the Appendix hereto at Pages 22-23.

REGULATIONS

Department of Interior Oil and Gas Regulations (Paragraph 12 1/2 (1920)), effective at the time of the assignment herein, are reprinted in the Appendix hereto at Page 25.

The current version of the regulation (43 C.F.R. § 3106.7-1 (1991)), effective at the time of the quiet title action herein, is reprinted in the Appendix hereto at Page 25.

STATEMENT OF THE CASE

This is a dispute between two private parties to an assignment of a property right in the proceeds of an oil and gas lease on certain federal lands in the Baker Gas Field in Fallon County, Montana. The assignment is reprinted in the Appendix hereto at Pages App. 20-21. The material facts are undisputed.

On October 10, 1934, George Norbeck of Redfield, South Dakota, was issued a 20-year oil and gas lease from the U.S. Department of Interior. The lease included a right of renewal.

This lease was subject to an operating agreement Norbeck entered into with a private company, Fidelity Gas Company. Norbeck retained record title of the lease with a right to 25 percent of the net proceeds of production. Norbeck appointed Fidelity as his attorney-in-fact to obtain renewal leases on his behalf. Fidelity later assigned operating rights in the deep formations to Shell Oil Company.

Eight months after issuance of the lease, on June 10, 1935, in Billings, Montana, Mr. and Mrs. George Norbeck assigned all their rights, title and interest in the lease to Mrs. M. H. Crawford of Santa Ana, California. The assignment was unconditional and provided express warranties to Mrs. Crawford. The assignment was to take effect immediately — "This assignment effective as of June 10, 1935" — although Norbeck agreed to undertake all necessary renewals and other applications until Mrs. Crawford's assignment was recorded by the Department of Interior.

On August 5, 1935, an attorney for George Norbeck sent Mrs. Crawford's assignment to the Interior Department's General Land Office (predecessor of the Bureau of Land Management), which recorded and managed leases for the federal government. The General Land Office wrote to Norbeck's attorney on January 31, 1936, rejecting the registration of this assignment because Norbeck's attorney failed to include a new required bond and failed to document Mrs. Crawford's citizenship and other holdings under the Mineral Leasing Act. There is no indication that Norbeck's lawyer notified Mrs. Crawford in Santa Ana, California, of the rejected assignment. Norbeck's lawyer did not resubmit the required information after receiving the rejection.

On May 1, 1936, Mrs. Crawford's assignment was recorded in the office of the Clerk and Recorder of Fallon County, Montana, at P. 252 of the Miscellaneous Book of Records. Norbeck never took any other action on the lease.

Norbeck died on October 22, 1938. All further actions in connection with the lease, including the posting of bonds, rental payments, and lease renewals, were undertaken by the operating agent, Fidelity Gas Company, or a sister company of Fidelity, Montana-Dakota Utilities Company.

Twenty years later, in 1954, Fidelity Gas applied for a renewal lease on behalf of Mrs. Crawford. After reviewing its records, the Land Office, however, refused to issue the renewal because Fidelity Gas did not have a power of attorney from Mrs. Crawford. The Land Office also still listed Norbeck as the record lessee.

Under the assignment, Fidelity was entitled to continue submitting renewal lease applications on behalf of Norbeck and it did so. To satisfy the Land Office's registration requirements and without contacting any other party, Fidelity then applied for a renewal lease as attorney-in-fact for Norbeck. The Land Office accepted this application and issued a renewal to Norbeck. In 1964 Fidelity applied for a second renewal as attorney-in-fact for Norbeck, and the renewal was issued.

The second renewal lease was put on producing status in 1968 by Shell Oil Company. Since then, some $420,000 in production payments have been allocated to the 25 percent interest assigned to Mrs. Crawford. Shell Oil Company continued to pay proceeds under the assignment into a "suspense account" titled for Mrs. Crawford. None of the payments were ever made to Mrs. Crawford.

On October 28, 1968, after the lease was put on producing status, the Land Office wrote to the "heirs of George Norbeck" that federal regulations required them to establish their succession to his interest in the lease. The Norbeck heirs essentially let the inquiry lie dormant until 1987, when they applied for the full interest in the lease.

On August 18, 1987, the Bureau of Land Management (BLM), the successor to the Land Office, notified the Norbeck heirs that it recognized their interest in the lease. At the bottom of its notice to the Norbeck heirs, the BLM stamped the statement: "Approval does not warrant that either party to this transfer holds legal or equitable title to this lease."

The Norbeck heirs transferred all of their interest in the lease to the Jane Norbeck Trust, Julius A. Bernard, Trustee. Subsequently, Jane S. Norbeck took over as trustee (Norbeck Trustee). On September 29, 1988, Shell Oil, which still recognized Mrs. Crawford's assignment, notified the trustee that Shell had completed its review of the claim to the interest but would not distribute the proceeds before completion of a quiet title action.

On October 22, 1990, the Norbeck Trustee began a quiet title action before the District Court for the Sixteenth Judicial District of Montana. No one was able to contact Mrs. Crawford. A default judgment for lack of appearance was taken against Mrs. Crawford. The District Court quieted title to Jane S. Norbeck, Trustee, on December 7, 1990.

Subsequently, the heirs of Mrs. M.H. Crawford (the Crawford heirs) learned of the quiet title action and filed a motion for relief from judgment. The District Court vacated the default and judgment on June 4, 1991. The Crawford heirs sought to quiet their title to 39/40ths of the disputed interest (a missing heir holds the remaining 1/40th interest).

The Sixteenth Judicial District Court of Montana formulated the federal question before it as:

> the effect of the 1935 assignment of an interest in a federal oil and gas lease on the rights of the parties in light of (1) the rejection and lack of approval by the Secretary of the United States Department of the Interior . . .

Norbeck, Trustee v. Crawford, et. al., No. DV 5436, p. 5 (Mont. 16th D.C., Fallon County, January 21, 1992), *reprinted* at App. 11.

The District Court in its memorandum answered its federal question:

> First the Court determines as a matter of law that the rejection of the assignment of federal lease in this case does not necessarily render the assignment void as between the parties. . . Essentially, the assignment was rejected on procedural grounds. There is no evidence that the assignee, M.H. Crawford [sic], was not qualified or that the assignment itself was in any way deficient.

App. 12.

The District Court further stated:

> However, this does not mean that the rejection of the assignment is without consequences. The public policy, as stated in 30 U.S.C., Sec. 187a, is that the assignment is not effective to transfer an interest until the Secretary approves the assignment. . . . Therefore, the Court concludes as a matter of law that, Plaintiffs are entitled to all proceeds attributable to the leasehold interest in question until the first day of the lease month following Defendants filing of a proper application for approval of the assignment as provided by federal law.

App. 12-13.

On August 25, 1992, the Montana Supreme Court affirmed the lower court's decision, citing only the federal statute and one federal District Court case as support for its position that Mrs. Crawford "failed to perfect the assignment with the Department of Interior pursuant to the language of the original lease and 30 U.S.C. § 187a." App. 5.

REASONS FOR GRANTING THE WRIT

Supreme Court Rules 10.1(b) and (c) indicate that grounds for issuing the writ may exist when a decision by the highest court of a state conflicts with decisions of federal courts of appeal or of this Court. Both of those con-

flicts appear in this case.

The basic issue in this case is whether the 1934 assignment between private parties was nullified by the refusal of the Department of Interior to register the assignment. A decision in favor of the heirs of the assignor would result in their receiving a windfall not authorized by state or federal law — a position rejected by virtually all federal courts to examine this question.

In addition, the decision by the Montana Supreme Court directly contravenes this Court's decision in *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966). In *Wallis*, this Court applied the doctrine that, in the absence of a "significant conflict between some federal policy or interest and the use of state law in the premises," state law is to "govern the dealings of private parties in an oil and gas lease validly issued under the Mineral Leasing Act of 1920." 384 U.S. at 68, 67.

The federal policy governing assignments of mineral leases is to avoid entanglements in disputes between private parties over leases under the Mineral Leasing Act. *Wallis*, 384 U.S. at 70, n.8. This policy is consistent with federal policies relating to assignments of other federal benefits. *See, e.g., Martin v. National Surety Co.*, 300 U.S. 588, 594-95 (1937). The Montana Supreme Court mistakenly assumed that the appropriate federal policy was simply to prevent **and abrogate** assignments of mineral leases.

In this case, the Montana Supreme Court, ignoring *Wallis*, the correct federal policies, federal regulations (even the 16th Judicial District Court's finding that the rejection of the registration of the lease does not necessarily render the assignment void as between the parties), cited only a federal statute and two federal cases before ruling that the lease assignment was nullified. This superficial view was error.

Under Montana law, the assignment was valid; federal policy defers to that judgment. The Montana Supreme Court's misapplication of federal law has ignored federal policy and altered the property rights of the parties, to Petitioners' detriment. If the Montana Supreme Court's decision is allowed to stand, the settled state of the law under *Wallis* and recognition of the correct federal policy will be confused, threatening other propertyholders' rights and threatening to entangle the federal government in an endless series of disputes between private parties.

I. THE CORRECT FEDERAL POLICY IS NON-ENTANGLEMENT.

It is settled law that federal statutes prohibiting assignments of claims or contracts "are for the protection of the Government and not for the regulation of the equities of the claimants as between themselves." *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369 (1945), *citing, Martin v. National Surety Co.*, 300 U.S. 588, 594-595 (1937).

The object of standing apart from private disputes, even in the presence of clear anti-assignment language in Mineral Leasing Act leases, is to prevent the federal government from becoming embroiled in disputes between private parties. "In the absence of such a rule, the Government would be in danger of becoming embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability." *Martin*, 300 U.S. at 594, *citing, Hobbs v. McLean*, 117 U.S. 567, 576 (1886).

Both the Montana courts in this case ignored this settled federal doctrine, and the policy which stands behind it. The Montana 16th District Court, for example, said that the public policy behind the anti-assignment language in the Mineral Leasing Act was simply to negate lease assignments not approved by the Secretary of Interior, even as between private parties, App. 12, a position im-

plicitly adopted by the Montana Supreme Court in its finding that Mrs. Crawford "failed to perfect" her interest with the Secretary of Interior. App. 5. Both the Montana Supreme Court and the 16th Judicial District Court cite only *Oasis Oil Co. v. Bell Oil & Gas Co.*, 106 F. Supp. 954 (W.D. Okla. 1952), as support for their interpretation; there are no other cases which support their position.

In fact, the federal government's rights were never in jeopardy. The government always had the power to institute forfeiture proceedings under Section 31 of the Mineral Leasing Act, a power not available to private parties.

Under the Montana Supreme Court's interpretation, the Norbeck Heirs would obtain a windfall benefit from a statutory provision intended to protect the federal government, and which this and other Courts have said may only be invoked by the Secretary. The Crawford Heirs, on the other hand, would be deprived of the benefits of a private assignment, valid under state law and effective between the private parties.

The policy of avoiding entanglements in private disputes is the federal policy which should be upheld in this case, not the unsupported policy of "perfection" with the Secretary identified by the Montana Supreme Court. It is the avoidance of entanglements which most clearly upholds the principles this Court enunciated in *Wallis*. Yet under the Montana Supreme Court's interpretation, the actions of the federal agency will be brought into any dispute between private parties concerning leases under the Mineral Leasing Act.

II. THE ASSIGNMENT IS VALID UNDER MONTANA LAW

A. The Principal Test is State Law Rights Between the Private Parties.

Twenty-five years ago this Court applied the doctrine that state law is to "govern the dealings of private parties in an oil and gas lease validly issued under the Mineral Leasing Act of 1920." *Wallis*, 384 U.S. at 67. *Wallis* should have been the starting point for the Montana Supreme Court; instead there was no discussion of state law. If state law had been considered, the assignment would have been effective.

B. Montana Law Does Not Permit Assignors to Take Advantage of Anti-Assignment Language in Federal Mineral Leases.

The inability of an assignor to take advantage of anti-assignment language in oil and gas leases was well-known in Montana at the time of the assignment. In *Herigstad v. Hardrock Oil Co.*, 52 P.2d 171 (Mont. 1935), for example, the Montana Supreme Court held that: "It is true, as asserted by the defendant, that the permit is not assignable without the consent of the Secretary of the Interior, but, on suit by an assignee, the defendant cannot take advantage of this department's regulation. *Isaacs v. De Hon*, 11 F.2d 943 (9th Cir. 1926)." 52 P.2d at 174.

Further, in *Aronow v. Bishop*, 86 P.2d 644 (Mont. 1938), the Montana Supreme Court was asked by an assignee to invalidate assignments of oil and gas leases between private parties because they were not approved by

the Land Office. Instead, the Court ruled:

> The next contention of plaintiff is that the assignments are not valid as required by rules promulgated by that department. These rules were promulgated for the benefit of the Department of the Interior, and the plaintiff here cannot take advantage of that regulation to defeat assignments. (citation omitted) The lack of approval by the Secretary of the Interior can only be raised by the government. (citation omitted)

86 P.2d at 647-648. As shown below, the Secretary properly stayed out of this private dispute. No one else, including respondents, could raise the defense of the anti-assignment clause.

C. The Private Parties Treated The Assignment As Effective.

In this case, until 1987, every private party involved treated the assignment as valid between the parties (and, as shown below, the federal agency disclaimed any intention to disturb private rights between the parties):

Mrs. Crawford: Mrs. Crawford was required under state law to record her interest in order to perfect her interest and to give constructive notice of the assignment. She did so, after the Land Office rejected registration of the assignment (the record does not indicate whether she knew of the rejection).

Fidelity Gas Company: Fidelity Gas Company tried to renew the lease in 1954 under the assignment in Mrs. Crawford's name. Under the BLM rules and under the assignment itself, Fidelity was entitled to continue renewing the lease under Norbeck's name and it did so.

Shell Oil Company: Shell Oil Company was required to recognize interests recorded in county records. It did so, segregating the lease proceeds in an account labeled for Mrs. Crawford, and escheating unclaimed proceeds to

the State of North Dakota in Mrs. Crawford's name (which also treated Mrs. Crawford's assignment as valid).

The Norbeck Heirs: The Norbeck heirs explicitly disclaimed any interest in the lease in 1949; they apparently never even heard about the lease until contacted by the Bureau of Land Management in 1968. Even after being contacted by BLM, they waited another 18 years before seeking an interest in the lease proceeds. They apparently didn't even check the land records in Fallon County before 1988, and by then had lost contact with Crawford.

There is no prohibition under state law against the assignment. The assignment was recorded. The parties treated the assignment as valid. Interested third parties, including government agencies, treated the assignment as valid. Thus, under state law, the Crawford heirs still have a valid assignment.

III. THE ASSIGNMENT IS VALID UNDER FEDERAL LAW.

A. Federal Policy Is To Leave The Validity of Assignments of Mineral Leases to the States.

The validity of the assignment to Mrs. Crawford will not be disturbed by federal law. In *Wallis*, this Court found no overriding federal reason to supersede state law in this area. 384 U.S. at 69. Where a state provides for transferability by written instrument, this Court found, the Mineral Leasing Act does not force federal supersession of state law. 384 U.S. at 69-70. A footnote in *Wallis* states that "the policies behind this law relate to the rights of private persons *vis-a-vis* the Secretary" of Interior. 384 U.S. at 69, n. 6.

The *Wallis* test has been followed in *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 31-32 (1977); *In Re:*

"Agent Orange" Product Liability Litigation, 506 F. Supp. 737 (E.D.N.Y. 1979), *rev'd*, 635 F.2d 987 (2d Cir. 1989), *cert. denied, Chapman v. Dow Chemical Co.*, 454 U.S. 1128 (1981); and other cases. The *Wallis* test may even be appropriate where the United States is a party, *United States v. Little Lake Misere Land Company, Inc.*, 412 U.S. 580, 603-04 (1973)("[S]tate law may be found an accceptable choice, possibly even when the United States itself is a contracting party.")

B. The Secretary Will Not Intervene In A Private Dispute Over An Assignment.

Federal officials will not determine the validity of an assignment of private interests under a federal oil and gas lease. As this Court pointed out in *Wallis*: "Where there is a private dispute as to the validity or effect of an assignment [under the Mineral Leasing Act of 1920], the Secretary does not decide the question and he will not approve the assignment or take other action until the parties settle their dispute in court." *Wallis*, 384 U.S. at 70, n. 8.

C. The Regulations Do Not Permit Intervention In a Private Dispute Over An Assignment.

The regulations implementing the Mineral Leasing Act support the *Wallis* view: "Transfers [of record title or of operating rights] are approved for *administrative purposes only*. Approval does not warrant or certify that either party to a transfer holds legal or equitable title to a lease." 43 C.F.R. § 3106.7-1 (1991)(Emphasis added).

D. The Federal Policy Was Followed By the Federal Agency In This Case.

The regulations and *Wallis* non-intervention doctrine were followed by the federal agency in this case. When the Bureau of Land Management wrote to the Norbeck

heirs in 1988 recognizing their interest in the lease registration, stamped on the BLM Form 3106 was the notation: "Approval does not warrant that either party to this transfer holds legal or equitable title to this lease."

Thus, under federal law, the Crawford Heirs' assignment, valid under state law, should have been left undisturbed. Instead, the Montana Supreme Court ignored *Wallis* and the regulations, and misapplied federal law to divest the Crawford Heirs of their property.

IV. THE MONTANA SUPREME COURT MISINTERPRETED AND MISAPPLIED THE EFFECT OF THE FEDERAL AGENCY'S ACTION.

The decision of the Montana Supreme Court is succinct and misguided. Following the reasoning of the 16th District Court, the Montana Supreme Court cited only the federal statute, 30 U.S.C. § 187a, and a single federal District Court case. *Oasis Oil Co. v. Bell Oil & Gas Co.*, 106 F. Supp. 954 (W.D. Okla. 1952). The Montana Supreme Court distinguished one other federal case. *Gibbons v. Pan American Petroleum Corp.*, 262 F.2d 852 (10th Cir. 1958).

Then the Montana Supreme Court declared that "Mrs. Crawford failed to perfect the assignment *with the Department of Interior* pursuant to the language of the original lease and 30 U.S.C. § 187a." App. 5 (emphasis added). There was no discussion of rights under state law.

The Montana Supreme Court thereby ignored *Wallis*, federal policy, federal regulations, and its own prior decisions. The effect of the decision was to deprive Petitioners of their property under the imprimatur of federal law.

V. THE MONTANA SUPREME COURT'S INTERPRETATION SHOULD BE REVERSED.

The decision of the Montana Supreme Court, ignoring *Wallis* and important federal laws and policies, should not be left to confuse litigants and courts wrestling with private disputes about federal leases or rights. Otherwise, litigants would attempt to drag the federal government into every private dispute over assignments under the Mineral Leasing Act. The precedent overturning the settled federal policy in this area could also expand the confusion over federal policy to disputes over other federal statutes with anti-assignment clauses.

The effect of allowing the Montana Supreme Court's decision to stand would be to contravene federal policy in this area and to contradict important decisions of this Court and other federal courts. The Montana Supreme Court decision should be reversed.

CONCLUSION

This Court should issue a summary opinion in this case instructing the Montana Supreme Court to follow *Wallis*. In the alternative, this Court should grant a petition for certiorari to the Montana Supreme Court to allow a full review of these important points.

Respectfully Submitted,

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Counsel for Petitioners

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PETITIONERS,

v.

HEIRS OF GEORGE NORBECK: Jane S. Norbeck, Trustee of the JANE NORBECK Trust dated November 20, 1963,

RESPONDENTS

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

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Counsel for Petitioners

No. 92-113

In The Supreme Court Of The State Of Montana

1992

JANE S. NORBECK, Trustee of the JANE NORBECK Trust dated November 20, 1963,

Plaintiff, Respondent and Cross-Appellant,

-vs.-

MRS. M.H. CRAWFORD and MR. M.H. CRAWFORD, her husband, if any, and other heirs, devisees, legatees, creditors, administrators, executors, and assigns of any of said defendants, if they be deceased; and any and all persons known or unknown, claiming or who might claim any right, title, estate or interest in or lien or encumbrance upon the real property situated in the County of Fallon, State of Montana, described as 25% of the net proceeds derived from the production as reserved by George Norbeck in operating agreement with Fidelity Gas Company included in and a part of U.S. Oil and Gas Lease prospecting permit, Billings Serial #021056 as to NE1/4, Section 12, Twp. 8N, Rge 59E of M.P.M., Fallon County, Montana or any thereof adverse to Plaintiff's title whether such claim be present or contingent including any claim or possible claim of dower, inchoate or accrued,

Defendants, Appellants, and Cross-Respondents.

APPEAL FROM: District Court of the Sixteenth Judicial District,

In and for the County of Fallon,

The Honorable Joe L. Hegel, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Charles J. Peterson, Mackoff, Kellogg, Kirby &

Kloster, Beach, North Dakota

For Respondent:

Chris Mangen, Jr., Crowley, Haughey, Hanson, Toole

& Dietrich, Billings, Montana

Submitted on Briefs: July 23, 1992

Decided: August 25, 1992

Filed: August 25, 1992

2 Justice R.C. McDonough delivered the Opinion of the Court.

Mrs. M.H. Crawford, et al., appeals from a judgment of the Sixteenth Judicial District Court, Fallon County. We affirm.

The sole issue on appeal is:

Whether the District Court erred in granting the disputed 25 percent interest in a federal oil and gas lease to Jane S. Norbeck, Trustee of the Jane Norbeck Trust, subject however to 39/40ths of such 25 percent interest being vested in Mrs. M.H. Crawford, et al., upon approval of the Department of the Interior.

In 1934, George Norbeck (Norbeck) obtained federal lease, 021056(b), from the United States Department of Interior. The lease contained a fixed twenty-year term and granted the lessee right of renewal upon expiration. The lease also contained a provision barring assignment without consent of the Secretary of the Interior through the land office.

Norbeck entered into an operating agreement with Fidelity Gas Company. He retained record title ownership of the lease, as lessee, with 25 percent of the net proceeds of production. Norbeck appointed Fidelity Gas Company as his attorney-in-fact to obtain renewal leases on his behalf. Subsequently, Fidelity Gas Company assigned the operating rights in the deep formations to Shell Oil Company.

In 1935, Norbeck made an assignment of the 25 percent interest to Mrs. M.H. Crawford. This assignment was rejected by the United States Land Office because Mrs. Crawford did not pay the required

[3] lease bond, or establish the necessary qualifications to own an interest in the lease. Mrs. Crawford did not pay any delay rentals. After the assignment, Mrs. Crawford had the assignment filed with the county clerk and recorder. Thereafter, Mrs. Crawford took no action in regard to the lease.

Fidelity Gas applied for a renewal lease in 1954 on behalf of Mrs. Crawford. The land office rejected the renewal because Fidelity Gas did not have authority to act on behalf of Mrs. Crawford, and the land office did not recognize Mrs. Crawford as a lessee. Fidelity then applied for a renewal lease as attorney-in-fact for Norbeck. The land office accepted this application and issued a renewal to Norbeck. In 1964 Fidelity applied for the second renewal as attorney-in-fact for Norbeck, and the renewal was issued. The second renewal lease was put on producing status in 1968. Since then, some $420,000 in production payments have been allocated to the 25 percent interest.

On October 28, 1968, the land office notified "heirs of George Norbeck" that under federal regulations they had to establish their succession to his interest in the lease. On August 18, 1987, the Bureau of Land Management (BLM), the successor to the land office, notified the Norbeck heirs that it recognized their interest in the lease.

The Norbeck heirs transferred all of their interest in the lease to the Jane Norbeck Trust, Julius A. Bernard, Trustee. Subsequently, Jane S. Norbeck took over as trustee (Norbeck

[4] Trustee). On September 29, 1988, Shell Oil notified the trustee that Shell had completed its review of the claim to the interest but would not distribute the proceeds without a quiet title action being completed.

On October 22, 1990, the Norbeck Trustee began a quiet title action before the District Court. Efforts were made to locate Mrs. Crawford, but no response was forthcoming. A default was taken against Mrs. M.H. Crawford. The District Court quieted title to Jane S. Norbeck, Trustee, on December 7, 1990.

Subsequently, the heirs of Mrs. M.H. Crawford (the Crawford heirs) surfaced and filed a motion for relief from judgment. The District Court vacated the default and judgment on June 4,

1991. The Crawford heirs sought to quiet their title to 39/40ths of the disputed interest. Jane S. Norbeck, Trustee, filed a motion for summary judgment. In response, the Crawford heirs moved for partial summary judgment.

The District Court, on January 17, 1992, ruled that Jane S. Norbeck, Trustee, owned all the allocated production proceeds. However, the District Court ruled the Crawford heirs could apply to the BLM for approval of the previously rejected assignment. Should the assignment be approved, the Crawford heirs would own 39/40ths of the disputed interest and the proceeds of production would be allocated to them after the first day of the month following application for approval. This appeal followed.

§ Our scope of reviewing motions for summary judgment is the same as the trial court and is a question of law. Summary judgment is granted only if no genuine issue of material fact exists.

The District Court found that federal oil and gas leases are governed by the Mineral Leasing Act of 1920, P.L. No. 146, 41 Stat. 437 (1920), as codified in 30 U.S.C. Sec. 5, 181 et seq. The original statute provided: "[N]o lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior."

30 U.S.C. Sec. 187a (1990) provides:

[A]ny oil or gas lease issued under the authority of this Act may be assigned. . ., subject to final approval by the Secretary . . ., to any person or persons qualified to own a lease under this Act, and any assignment or sublease shall take effect as of the first day of the lease month following the date of filing in the proper land office of three original executed counterparts thereof, together with any required bond and proof of qualification under the Act of the assignee or subleasee to take or hold such lease or interest therein . . . .

The District Court, in light of 30 U.S.C. 187a, ruled the Crawford heirs would own 39/40ths of the disputed interest upon the approval of the assignment by the BLM.

The case of Oasis Oil Co. v. Bell Oil & Gas Co. (W.D.

Okla. 1952), 106 F.Supp 954, followed 30 U.S.C. § 187a, and held that Oasis Oil Company (the assignor) was the sole record holder of the lease and was entitled to all of the oil runs from the well on the lease. *Oasis* at 957. In *Oasis*, the assignee, Fish, failed to pay the requested fee, and provided insufficient information to the

[6] Department of Interior which refused to approve the assignment. Thus, the assignment did not convey any interest in the lease under the statute until the date the Secretary of Interior approved the lease.

The Crawford heirs rely on Gibbons v. Pan American Petroleum Corporation (10th Cir. 1958), 262 F.2d 852, for the proposition that neither Norbeck nor his heirs were obligated under the lease after the assignment. However, this proposition is contrary to the facts before us. The Department of Interior viewed Norbeck as the record owner of the lease. The renewals were made and accepted in his name. A renewal submitted on behalf of Mrs. M.H. Crawford was rejected because the assignment had never been approved. Delay rentals became the responsibility of Norbeck, whether he paid them or not. In *Gibbons*, the Tenth Circuit stated that Gibbons's failure to submit the assignment for approval could not destroy the obligation of an assignee under the lease. *Gibbons* at 854. Thus *Gibbons* rests on the fact that Gibbons did *not* submit the assignment for approval. Here, Mrs. M.H. Crawford applied to the land office for approval of the assignment and it was rejected.

The material facts are not in dispute. Norbeck made an assignment to Mrs. Crawford, but she failed to perfect the assignment with the Department of Interior pursuant to the language of the original lease and 30 U.S.C. § 187a. Later attempts were made to have Mrs. Crawford pay the rentals, but without success. As a result, the obligations under the lease remained with Norbeck.

[7] Neither the assignor nor assignee, or their heirs, acted relative to any rights they had until awakened by Shell Oil. The District Court ordered the existing proceeds of the 25 percent interest paid to the Norbeck heirs; however, by its order, it allowed the Crawford heirs the opportunity to perfect the assign-

ment by seeking approval of the Secretary of Interior under 30 U.S.C. § 187a.

Based on the evidence presented in the record, we agree with the determination of the District Court and affirm the District Court.

/s/ R.C. McDonough

Justice

We Concur:

/s/ J.A. Turnage

Chief Justice

/s/ John Conway Harrison

/s/ William E. Hunt Sr.

/s/ Karla M. Gray

/s/ Terry Trieweiler

/s/ Fred Weber

Justices

MONTANA SIXTEENTH JUDICIAL DISTRICT
COURT, FALLON COUNTY

No. DV 5436

JANE S. NORBECK, Trustee of the JANE S. NORBECK TRUST dated November 20, 1963,

Plaintiff,

vs

Mrs. M.H. CRAWFORD et al.,

Defendants.

MEMORANDUM AND ORDER

GRANTING SUMMARY JUDGMENT

Before the Court are the parties' cross-motions for Summary Judgment. This matter has been thoroughly briefed by both parties and this matter was argued orally on December 19, 1991. No record of the oral argument/hearing was made pursuant to stipulation of counsel. Defendant's counsel was granted an additional 10 days within which to submit a reply brief, due to Plaintiff's submission of a Reply Brief shortly before the hearing. The matter now being submitted, and based on the pleadings, affidavits and other documents on file, and for the reasons stated in the Memorandum below, the Court finds that there is no genuine issue of material fact and that summary judgment is appropriate.

MEMORANDUM

I. FACTS AND PROCEDURE:

The following facts appear to be established without any substantial controversy and are deemed to exist:

1. On October 10, 1934, the United States Department of the Interior issued to George S. Norbeck Federal Lease No. 021056(b) covering, among others, the following described lands in Fallon County, Montana:

Township 8 North, Range 59 East, M.P.M.

Section 12. NE1/4

The lease was issued for an initial 20-year term with a preemptive right to apply for renewal. The Lease contained provisions for delay rentals on non-producing lands. It also contained the Lessee's agreement not to assign any interest in the lease without consent by the Secretary of the Interior, acting through the General Land Office (now Bureau of Land Management - BLM).

2. The above-described federal lease was subject to an operating agreement between George Norbeck and Fidelity Gas Co., dated May 16, 1934. In the operating agreement, Mr. Norbeck appointed Fidelity Gas as his attorney-in-fact to obtain renewal leases on his behalf. Fidelity Gas later assigned the operating rights in the deep formations (below 2,000 feet) to Shell Oil Company.

3. On June 10, 1935, George S. Norbeck (and Jane M. Norbeck, his wife) assigned his interest in said lease to one M.H. Crawford (with respect to the land described above), presumably for a valuable consideration.

4. On May 1, 1936, M.H. Crawford (or someone on her behalf) caused the assignment to be recorded in the office of the Clerk and Recorder of Fallon County, Montana at p. 252 of Miscellaneous Book of Records.

5. Other than recording the assignment with the Clerk and Recorder, M.H. Crawford took no other action with respect to her interest in the lease.

6. Federal oil and gas leases are governed by the Mineral Leasing Act of 1920, Pub.L.No. 146, 41 Stat. 437 (1920), now codified at 30 U.S.C. Secs. 181 *et seq*. As originally enacted the provision regarding assignment of leases stated: [N]o lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior. 30 U.S.C. Sec. 187. General Land Office Regulations required that the written consent of the Secretary of the Interior "be first had and obtained." This provision has been interpreted as meaning that the assignment did not convey any interest in the lease until the date the Secretary approved the lease. See *Oasis Oil Co. v. Bell Oil & Gas Co.* (D.C. 1952) 106 F.Supp. 954, 957. The statutory provisions now in effect regarding oil and gas leases

provide:

"[A]ny oil and gas lease issued under the authority of this Act may be assigned . . ., subject to final approval by the Secretary . . ., to any person or persons qualified to own a lease under this Act, and any assignment or sublease shall take effect as of the first day of the lease month following the date of filing in the proper land office of three original executed counterparts thereof, together with any required bond and proof of qualification under the Act of the assignee or sublessee to take or hold such lease or interest therein" [emphasis supplied].

30 U.S.C. Sec. 187a (1990). Thus, while the Secretary's approval is still required, the effective date of the assignment could date back to the date a full and complete application was filed in the proper land office. A full and complete application would include the required bond and proof of qualifications of the assignee.

7. The subject lease contains the following language regarding assignments:

"SEC. 2. In consideration of the foregoing, the lessee hereby agrees:

"(k) *Assignment of lease.* — Not to assign this lease or any interest therein, nor sublet any portion of the leased premises, except with the consent in writing of the Secretary of the Interior first had and obtained."

Any assignment of the subject lease was necessarily subject to the restrictions on assignment contained in the language of the lease itself and subject to the restrictions contained in federal statutes and regulations.

8. On or about January 31, 1936, the General Land Office rejected the purported assignment from George Norbeck to Mrs. M.H. Crawford because she had not filed her affidavit of qualifications and she had not posted the required $5,000 lease bond.

9. Shortly before the expiration or the primary term of the lease, October of 1954, Fidelity Gas filed an application for renewal of the subject lease on behalf of Mrs. M.H. Crawford. The General Land Office rejected the application for two rea-

sons: (1) Fidelity Gas did not have authority to act for Mrs. Crawford (they had no power of attorney), and (2) the Land Office did not recognize Mrs. Crawford as the lessee because the assignment to her had been rejected.

10. Following the refusal of the Land Office to approve the renewal application on Mrs. Crawford's behalf, Fidelity Gas applied for a renewal lease on behalf of Mr. Norbeck by authority of its appointment as attorney-in-fact for Mr. Norbeck in the 1934 operating agreement. The Land Office accepted such application and issued its first renewal lease to George Norbeck, effective October 1, 1954.

11. Ten year later, when the first renewal lease was about to expire, Fidelity Gas applied for a second renewal lease as attorney-in-fact for George Norbeck. The Land Office accepted the application and issued the second renewal lease to Mr. Norbeck, effective October 1, 1964.

12. The second renewal lease was put on producing status in 1968, because of production from the Pennel Unit operated by Shell Oil. Since 1968, over $420,000 has been allocated to the disputed interest and withheld by Shell Oil. This does not include whatever amounts which previously had been escheated to the State of North Dakota prior to the Norbecks asserting their claim to the proceeds.

13. By letter, dated September 29, 1988, Shell Oil suggested to the heirs of George Norbeck that they quiet title to the subject lease so Shell Oil could pay out the funds it was holding on account for the owners of the subject lease.

14. In 1990, the heirs of George Norbeck filed the instant action requesting that title to the subject lease be quieted in them and that they be entitled to receive all proceeds of such lease then held in suspense by Shell Oil Company.

15. As neither Mrs. Crawford nor her heirs could be located, service was accomplished by publication. Applicable time periods passed without appearance of any adverse parties and the Clerk of Court duly entered the default of the defendants, and on December 7, 1990, the Court entered judgment quieting title to the subject lease in Plaintiffs.

16. Following the issuance of judgment quieting title, Shell Oil Company paid over to plaintiffs the sum of $421,660.15, representing the proceeds which had been allocated to the subject lease and held in suspense pending clarification of title.

17. Defendants made their first appearance in this case on April 19, 1991, 133 days following the entry of the default judgment against them. On June 4, 1991, this Court vacated the default judgment so that the matter could be resolved on the merits.

II. DISCUSSION:

The question before the Court is the effect of the 1935 assignment of an interest in a federal oil and gas lease on the rights of the parties in light of (1) the rejection and lack of approval by the Secretary of the United States Department of the Interior, and (2) the passage of time and apparent abandonment of the leasehold interest.

Plaintiffs claim, among other things, that since the Secretary of the Interior rejected the proposed assignment, that the assignment is null and void, cannot be enforced between the parties and cannot be resubmitted to the Secretary for approval. Plaintiffs claim Defendants' only recourse, following the rejection by the Secretary, would be an action for recision of the contract (assignment), and that such an action is barred by any imaginable statute of limitations. Therefore, the Plaintiffs claim all other questions are moot. Since the assignment is void, title has remained in Plaintiffs and all the Court needs to do is to declare that as a matter of law and quiet title in them. Plaintiffs claim further that it would be illegal (or at lease against public policy) for this Court to give effect to the assignment in the face of the rejection by the Secretary of the Interior.

Defendants, on the other hand, argue that the rejection by the Secretary is not determinative of the rights between the parties and that although a proposed assignment of a federal lease is rejected, the assignees can resubmit the lease for approval at any time regardless of the passage of time. Defendants also argue that they haven't reapplied because they need to clear up this challenge to their title first. They claim that Plaintiffs have

a continuing duty to protect and defend merchantable title in the Defendants under the warranty clause of the lease. Defendants have argued that this continuing duty includes a duty to apply for renewals of the lease, pay or at lease remain responsible for paying delay rentals and other obligations under the lease, and to actively seek the heirs of M.H. Crawford. In effect, Defendants argue that this duty continues indefinitely and that so long as they recorded their assignment, Defendants need do nothing further to perfect their interest in the lease. The defendants argue the assignment is enforceable regardless of its apparent abandonment and that all the court need do is quiet title in them, and then they will apply for the approval of the Secretary, some 57 years after the original assignment. Defendants have also stated they are entitled to the proceeds held in suspense by virtue of the assignment of the operating agreement under the lease. Finally, Defendants have filed counterclaims, essentially alleging Plaintiffs have breached their contract obligations under the lease, and in particular under the warranty provisions of the lease, by filing the instant lawsuit.

The Court concludes that neither Plaintiffs nor Defendants are totally correct.

First, the Court determines as a matter of law that the rejection of the assignment of federal lease in this case does not necessarily render the assignment void as between the parties. The assignment was rejected because M.H. Crawford failed to present the required proof of her qualifications and the required bond. Essentially, the assignment was rejected on procedural grounds. There is no evidence that the assignee, M.H. Crawford, was not qualified or that the assignment itself was in any way deficient. Nor has the Court been made aware of any federal statute, regulation or other policy which would prevent Defendants from resubmitting the assignment, only this time with the required proof and bond. Nor does it appear that the letter of rejection prohibits such a resubmittal.

However, this does not mean that the rejection of the assignment is without consequences. The public policy, as stated in 30 U.S.C., Sec. 187a, is that the assignment is not effective to transfer an interest until the Secretary approves the assignment. Until then, the assignor, in this case, the Norbecks, re-

main responsible to perform all obligations under the lease and arguably also remain entitled to receive the benefits under the lease. See *Oasis Oil Co. v. Bell Oil & Gas Co.*, (D. Okla. 1952). 106 F.Supp. 954, 957. Formerly, the effective date of an assignment was the actual date the assignment was approved or consented to by the Secretary of the Interior. The current version of Sec. 187a provides that upon approval by the Secretary an assignment becomes effective as of "... the first day of the lease month following the date of filing in the proper land office ..." Therefore, the Court concludes as a matter of law that, Plaintiffs are entitled to all proceeds attributable to the leasehold interest in question until the first day of the lease month following Defendants filing of a proper application for approval of the assignment as provided by federal law.

Subject to the approval of the Secretary of the Interior, Defendants will be entitled to a 39/40th interest in the subject leasehold interest and the proceeds attributable thereto following the effective date of the assignment. The 1/40th interest attributable to the heir who has not been joined as a party defendant shall be deemed forfeited to the Plaintiffs under the theory of laches set forth below. If the Defendants fail to file a proper application for approval of the subject lease, supported by the required proofs and bonds, within 180 days of the date of this order, the remaining 39/40th interest, shall be forfeited to the Plaintiffs under the theory of laches set forth below. If the Defendants ultimately fail to obtain approval of the assignment and the Secretary of the Interior, or his designate, clearly indicates that the lease is rejected on it merits and the Secretary will not entertain resubmission of such lease, then the remaining 39/40th interest, together with any accumulated proceeds, shall be forfeited to the Plaintiffs under the theory of laches set forth below as well.

As an alternative ground for finding Plaintiffs entitled to the proceeds attributable to the lease to date, the Court finds the Defendants' claims to the proceeds barred by the doctrine of laches. Laches is an equitable doctrine, the Montana Supreme Court has recently addressed in the case of *Richardson v. Richland County* (Mont. 1985), 711 P.2d 777, 782:

In *Matter of Estate of Wallace* (1980), 186 Mont. 18, 606

P.2d 136, this Court pointed out that there is no absolute rule as to what constitutes laches in Montana and that each case must be determined according to its own peculiar circumstance. The court emphasized that laches is not a mere matter of elapsed time, but is principally a question of the inequity of permitting a claim to be enforced.

> Laches ... is a concept of equity; it means negligence in the assertion of a right; it is the practical application of the maxim, "Equity aids only the vigilant"; and it exists when there has been unexplained delay of such duration or character as to render the enforcement of the asserted right inequitable.

Wallace, 186 Mont. at 25, 606 P.2d at 140.

Sec. 1-3 218, MCA states: "The law helps the vigilant before those who sleep on their rights."

The Court then quoted from *O'Hanlon v. Ruby Gulch Min. Co.* (1922), 64 Mont. 318, 209 P. 1062, where the Court stated:

> While it is true that the statute of limitations had not run against the claim now asserted by plaintiffs, that fact alone does not determine their rights. The delay which will bar relief in equity is not necessarily measured by the period prescribed by the statute. It may be much less, depending upon the peculiar circumstances of the case, and in determining whether laches shall bar a particular claim it is proper to consider whether a party or an important witness has dies (sic), and the party against whom the claim is asserted has been deprived thereby of important testimony [citing case], or whether the property involved has increased in value [citing case], or whether the property has passed into the hands of an innocent third party [citing case], or whether the position of the parties is so changed otherwise that an injustice will follow a failure to apply the doctrine [citing case].

Barrett v. Zenisek, 132 Mont. at 239-40, 315 P.2d at 1007. In this particular case, the Court considers the following factors important in the application of the doctrine of laches:

A.Defendants abandoned the property back in the 1930s. The property was unproductive at the time. There were drilling restrictions in place and it was unlikely to become productive in

the near term. And, there is evidence that Mrs. Crawford not only did not pay delay rentals, but refused to pay delay rentals. See Letter of F. Millar Cloud, Attorney at Law, dated March 16, 1939--Exhibit "5" in Appendix of Exhibits to Brief in Support of Plaintiff's Rule 56 Motion for Summary Judgment. In addition, Mrs. Crawford did nothing to perfect her interest in the lease, i.e., obtain the consent of the Secretary of the Interior. She did not post the required bond, nor provide an affidavit as to her qualifications. Apparently, she did not consider that she owned the property as it was not included in any designation of her assets in probate or otherwise, and none of her heirs had any idea that she owned such a property.

B.From 1935 to present, the Defendants allowed the Plaintiffs to continue to be responsible for the obligations under the lease, including the obligation to pay delay rentals (whether actually paid or not), to obtain renewals of the lease, etc.

C.The Defendants have given no credible or satisfactory explanation of the reason for the delay in assuming the obligations as well as the benefits of the assignment of leasehold interest.

D.The property became productive in the late 1960s and became extremely valuable.

E.Defendants have allowed Shell to possess the oil and gas proceeds attributable to the leasehold interest until such time as Shell began escheating the same to the State of North Dakota.

F.Both principals are now deceased and no one has produced a living, contemporary witness who could testify regarding the transaction.

G.Plaintiffs did not begin this action to quiet title and lay claim to the proceeds until after Shell had indicated that they were escheating the proceeds to the State of North Dakota and Shell could not pay the proceeds to Plaintiffs in the absence of an appropriate court order.

H.The Defendants were not aware of any possible interest they might have and did not begin to participate in this case until after default judgment had been entered against them, and third-party title searchers located them, informed them of their

possible interest in exchange for a finder's fee.

I.Had Plaintiffs not instituted this action, there is no reason to believe the Defendants would have ever become involved and the proceeds would continue to escheat to the State of North Dakota.

Therefore, the Court determines that Defendants have forfeited any right to the accumulated proceeds by reason of laches. Since laches is an equitable remedy, the Court will not extend the relief to encompass actual title to the leasehold interest itself, since Plaintiffs themselves have delayed responding to the situation. Their active participation, over the years, although significant, has not been so substantial as to render it inequitable to allow the Defendants one last chance to enforce the assignment against them, at least as to the leasehold interest itself and future proceeds of the leasehold interest. Therefore, the Court will quiet title in the Defendants to the leasehold interest and proceeds to accrue as currently provided by 30 U.S.C. Sec. 187a, subject to the approval of the Secretary of the Interior. If, however, the Secretary fails to approve the assignment this time, the entire leasehold interest shall revert to the Plaintiffs and Defendants' rights shall be extinguished.

Finally, Defendants claim that even if they are not entitled to enforce the actual assignment of lease, they are entitled to enforce the terms of the operating agreement which was also assigned by the assignment in question. This claim must fail for the following, alternative reasons:

1.The lease refers to the operating agreement being assigned by separate instrument, but this Court has not been presented with any evidence that such assignment was actually made and recorded. The assignment of lease does not by its own terms effect the assignment of the operating agreement. Therefore, there is no evidence before the Court to support such an argument. The fact that Fidelity Gas Company did not have a power of attorney from Mrs. Crawford is additional evidence that the assignment of the operating agreement was never effected. Therefore, although Defendants have certain equitable rights under the assignment of lease, they do not have any additional legal rights under the operating agreement itself.

2.Even if the assignment of operating agreement did exist or even if the assignment of lease was interpreted so as to effect such an assignment, to the extent such an operating agreement purported to effect an assignment of rights under the lease in question, it would be subject to all valid federal rules and regulations restricting transfer as well as all restrictions contained in the lease itself. To hold otherwise would allow persons to easily end-run the transfer restrictions and thereby violate the public policy expressed in the laws containing such restrictions.

III. COUNTERCLAIMS

Defendants have filed counterclaims against the plaintiffs all alleging that the plaintiffs have, by the act of filing this action for quiet title, breached their obligations under the warranty clause of the assignment and otherwise committed a fraud upon the Court. Except for Count I regarding quiet title to the leasehold interest, Defendants' claims must fail for the reasons set forth below.

A. QUIET TITLE:

As stated above, Defendants will be given one more reasonable opportunity to obtain the consent of the Secretary of the Interior to the assignment of lease. If successful, title will be quieted in Defendants to the leasehold interest and the proceeds thereof effective as of the date provided by 30 U.S.C. Sec. 187a. If unsuccessful, title will be quieted in the Plaintiffs. Please refer to the discussion of the application of the doctrine of laches and the application of federal law above.

B. BREACH OF WARRANTY AND OTHER CLAIMS:

Defendants' claim for breach of warranty must fail for the following reasons:

1.The failure in Defendants' title did not arise out of any action by the Plaintiffs, but out of Defendants' own inaction.

2.Defendants breached the terms of the contract (assignment) first, by not assuming and holding Plaintiffs harmless from the obligations imposed under the lease. One who first breaches a contract cannot complain of a subsequent breach by the other party. It would be unreasonable to expect the Plain-

tiffs to shoulder the burden of the leasehold obligations indefinitely (in this case for 56 years to date) and still be held to defend title on behalf of the breaching party.

3.Defendants have not shown a probability of damages. Had the Plaintiffs not filed this action, all the evidence indicates Defendants never would have known about their possible claim and the proceeds would have continued to escheat to the State of North Dakota.

4.Plaintiffs have made out a good claim for laches on the party of the Defendants. Therefore, they have not wrongfully laid claim to that which was not theirs. They have not committed conversion.

5.Plaintiffs have not committed fraud because:

a.Plaintiffs proceeded only after Shell Oil Company could not find M.H. Crawford or her heirs and was escheating the proceeds to the State of North Dakota. Plaintiffs did not lay any claim to the proceeds prior to that time even though they knew of a possible claim as early as 1969. They only made a claim after it appeared that no one else was going to lay claim to the property in question.

b.This Court recollects Mr. Culver advising the Court of the existence of the rejected assignment prior to entry of the decree quieting title. Therefore, the Court was not mislead. Rather than showing a fraudulent intent, the facts of this case merely illustrate the confusion which can occur when you have two chains of title: one state and one federal. The Court does not consider that it was mislead in any material way with respect to the prosecution of this action.

c.Defendants are not entitled to specific performance of a contact that they themselves have first breached. They waited an unreasonable length of time to assume their obligations and assert their rights to this kind of relief under the contract. 27-1-416, MCA. In any event, this Court's ruling on then quiet title claims should be sufficient to convey the interest to Defendants to which they are entitled.

d.Defendants are not entitled to delivery of the personal property for the reasons stated above, and, in particular, because

to the extent they did not assume the burdens of the lease, they are not entitled to its benefits.

IV. ORDER:

THEREFORE, IT IS ORDERED:

A.Summary Judgment is granted to Plaintiffs to the extent stated above and in favor of Defendants as to the remainder.

B.Plaintiffs' counsel shall prepare a Judgment in accordance with the foregoing Memorandum and shall mail it to the Judge and serve the same on opposing counsel. Counsel will have 5 working days within which to object to the form of the judgment.

C.Each party shall pay their own costs and counsel fees.

D.The Clerk of Court shall mail a copy of this document to counsel of record and any unrepresented parties.

DATED: January 17, 1992

(COURT SEAL)/s/ JOE L. HEGEL, District Judge

CC: Russell L. Culver; Chris Mangen, Jr.; Charles J. Peterson; Honorable Joe L. Hegel

NOTE: Stamped "Jan. 21, 1992" Carol Wade

Clerk of the Court"

ASSIGNMENT

KNOW ALL MEN BY THESE PRESENTS, that we, George Norbeck and Jane M. Norbeck, husband and wife, of Redfield, South Dakota, in consideration of One Dollar ($1.00) and other considerations of value, in hand paid, do hereby sell, assign, transfer and set over to Mrs. M.H. Crawford, of Santa Ana, California, hereinafter referred to as Assignee, NE1/4 Section 12, Twp. 8 N. Range 59 E.M.P.M. Fallon County, Montana, included in and a part of United States oil and gas prospecting permit, Billings Serial 021056 (consolidated), dated December 5, 1927; assigning hereby also such United States oil and gas lease or leases as may have been or may be issued to the undersigned George Norbeck pursuant to the terms of the aforesaid oil and gas prospecting permit and application for lease, which has been made and filed with the Secretary of the Interior, the rentals thereon paid, and which has been approved by the Secretary of the Interior.

This assignment is made subject to royalties reserved unto the original permittee and/or his assigns, amounting to Seven and one-half (7-1/2%) per centum on the Class A acreage, and Two and one-half (2-1/2%) per centum on the Class B acreage; and to the royalties reserved to the United States; (and to a royalty of Seven and one-half (7-1/2%) per centum on all gas produced and saved from sands lying and being within said premises at a depth of two thousand (2000) feet or less, assigned to the Atlantic Pacific Oil Company of Montana). This assignment is also made subject to the hereinafter designated and mentioned contracts (insofar as applicable to NE1/4 Sec. 12) heretofore made by the said George Norbeck and Jane M. Norbeck, if her signature was required, all of which said contracts, are, by separate instruments, assigned to the assignee above named in this assignment, and which said contracts are:

1.Operating Agreement between George Norbeck and Fidelity Gas Company, dated May 4, 1934;

The said George Norbeck and Jane M. Norbeck shall, and will, and by these presents do warrant and defend the title to

said aforementioned property unto said assignee, his heirs and assigns fully, and they do further warranty and fully guarantee their right to convey the same, free and clear of liens and encumbrances. The said George Norbeck and Jane M. Norbeck to further covenant and agree to and with said assignee that they will execute and deliver to said assignee, his heirs and assigns, any further assignment or assignments requested by said assignee, if by said assignee deemed necessary to complete or perfect this assignment and transfer of any contractual rights to aforementioned property, or any right or interest therein, held by said George Norbeck and Jane M. Norbeck, or either of them. The said George Norbeck and Jane M. Norbeck do further represent and warrant that all rentals due to the United States of America, on said property, and all royalties reserved or held thereon, have been paid to December 1, 1934; and they further stipulate and agree that they will pay such royalties and rentals to date hereof, (assignee assuming the payment of rentals and royalties from said date).

This assignment effective as of June 10, 1935.

Dated at Billings, State of Montana on this 10th day of June, A.D. 1935

/s/George Norbeck

/s/Jane M. Norbeck

(Notary)

30 U.S.C. § 187a. Oil or gas leases; partial assignments

Notwithstanding anything to the contrary in section 187 of this title, any oil or gas lease issued under the authority of this chapter may be assigned or subleased, as to all or part of the acreage included therein, subject to final approval by the Secretary and as to either a divided or undivided interest therein, to any person or persons qualified to own a lease under this chapter, and any assignment or sublease shall take effect as of the first day of the lease month following the date of filing in the proper land office of three original executed counterparts thereof, together with any required bond and proof of the qualification under this chapter of the assignee or sublessee to take or hold such lease or interest therein. Until such approval, however, the assignor or sublessor and his surety shall continue to be responsible for the performance of any and all obligations as if no assignment or sublease had been executed. The Secretary shall disapprove the assignment or sublease only for lack of qualification of the assignee or sublessee or for lack of sufficient bond: *Provided, however,* That the Secretary may, in his discretion, disapprove an assignment of any of the following, unless the assignment constitutes the entire lease or is demonstrated to further the development of oil and gas:

(1) A separate zone or deposit under any lease.

(2) A part of a legal subdivision.

(3) Less than 640 acres outside Alaska or of less than 2,560 acres within Alaska.

Requests for approval of assignment or sublease shall be processed promptly by the Secretary. Except where the assignment or sublease is not in accordance with applicable law, the approval shall be given within 60 days of the date of receipt by the Secretary of a request for such approval. Upon approval of any assignment or sublease, the assignee or sublessee shall be bound by the terms of the lease to the same extent as if such assignee or sublessee were the original lessee, any conditions in the assignment or sublease to the contrary notwithstanding.

Any partial assignment of any lease shall segregate the assigned and retained portions thereof, and as above provided, release and discharge the assignor from all obligations thereafter accruing with respect to the assigned lands; and such segregated leases shall continue in full force and effect for the primary term of the original lease, but for not less than two years after the date of discovery of oil or gas in paying quantities upon any other segregated portion of the lands originally subject to such lease. Assignments under this section may also be made of parts of leases which are in their extended term because of any provision of this chapter. Upon the segregation by an assignment of a lease issued after September 2, 1960 and held beyond its primary term by production, actual or suspended, or the payment of compensatory royalty, the segregated lease of an undeveloped, assigned, or retained part shall continue for two years, and so long thereafter as oil or gas is produced in paying quantities.

Mineral Leasing Act of February 25, 1920

(41 Stat. 437)

SEC. 30. That no lease issued under the authority of this act shall be assigned or sublet, except with the consent of the Secretary of the Interior. The lessee may, in the discretion of Secretary of the Interior, be permitted at any time to make written relinquishment of all rights, under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included with the lease. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the employment of any boy under the age of 16 or the employment of any girl or woman, without regard to age, in any mine below the surface; provisions securing the

workmen complete freedom of purchase; provision requiring the payment of wages a least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare: ***Provided***, That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated.

Section 31 of the Mineral Leasing Act of February 25, 1920. (41 Stat. 437).

Sec. 31. That any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, of the lease, or of the general regulations promulgated under this Act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.

§ 3106.7 Approval of transfer.

§ 3106.7-1 Failure to qualify.

No transfer of record title or of operating rights (sublease) shall be approved if the transferee or any other parties in interest are not qualified to hold the transferred interest(s), or if the bond, should one be required, is insufficient. Transfers are approved for administrative purposes only. Approval does not warrant or certify that either party to a transfer holds legal or equitable title to a lease.

Department of Interior Oil and Gas Regulations (1920), Paragraph 12-1/2.

ASSIGNMENT OF PERMITS. – Permits, after being awarded, may be assigned to qualified persons or corporations upon first obtaining consent of the Secretary of the Interior. Mere rights to receive a permit are not assignable.